FILED
OCT 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-461

In The
Supreme Court of the United States
October Term, 1988

KIMBER PETROLEUM CORPORATION,
Appellant,

v.

CHRISTOPHER J. DAGGETT, Acting Commissioner, State of New Jersey, Department of Environmental Protection,
Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND APPENDIX

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QUESTIONS PRESENTED

1. Whether the treble damages provision within New Jersey's Spill Compensation and Control Act, *N.J.S.A.* 58: 10-23.11 et seq., which authorizes under certain circumstances but does not require an award of three times the State's costs in addressing hazardous contamination against those parties deemed liable for the cleanup satisfies the requirements of the due process clause?

2. Whether Kimber Petroleum Corporation was denied due process by the New Jersey Supreme Court's order requiring it to abide by its prior pledge to pay for the provision of an alternate water supply to an area affected by groundwater contamination if the Court sustained the validity of the directive of the New Jersey Department of Environmental Protection that sought such payment?

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MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee, Christopher J. Daggett, Acting Commissioner, State of New Jersey, Department of Environmental Protection respectfully moves pursuant to *R.* 16(1)(b) and (d) to dismiss this appeal or affirm the judgment and order of the New Jersey Supreme Court because the issues presented do not raise substantial federal questions meriting plenary review by this Court, and because this case was correctly decided below in keeping with uniform federal caselaw upholding the constitutional validity of treble damages provisions that contain good faith defenses to treble liability.

COUNTERSTATEMENT OF THE CASE

This appeal questions the constitutionality of the treble damages provision of New Jersey's Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.* ("the Spill Act"), which authorizes, under certain circumstances, the award of three times those costs incurred by the State in responding to hazardous waste contamination. *N.J.S.A.* 58:10-23.11f(a). As this Court recognized in *Exxon v. Hunt,* 475 *U.S.* 355 (1986), New Jersey's Spill Act prohibits the release of hazardous substances into the environment and seeks to insure that all necessary cleanup and removal measures are performed in response to any release. To conserve the scarce public funds available for cleanup activities, the Spill Act seeks to encourage those responsible for the contamination to address promptly their liability with their own private resources. *See N.J.S.A.* 58:10-23.11a. The Act's principal means of encouraging private party cleanups is the risk of treble damages that may be imposed on a private party if government must clean up the toxic contamination with public monies.

The mechanics of the Spill Act's treble damages provision are relatively straightforward. In response to an incident of contamination, the New Jersey Department of Environmental Protection ("NJDEP") can choose either to perform the necessary response itself or to direct those parties believed to be responsible for the contamination to take or arrange for the cleanup and removal activity. *N.J.S.A.* 58:10-23.11f(a). If the NJDEP seeks private participation in the cleanup activity, it is empowered to issue a directive to those believed responsible for the discharge

of the hazardous substances, notifying those parties of their perceived liability for the discharge and specifying the nature of the removal activities deemed necessary to address the discharge. If the recipient of the directive uses its own funds to perform those cleanup activities identified by the NJDEP, the legislative goal of conserving scarce public cleanup funds is served.

However, if the recipient of a cleanup directive fails to perform the identified cleanup measures, and if the NJDEP performs the cleanup with public funds, the State can sue the directive recipient for recovery of three times the cost of the cleanup activities. *N.J.S.A.* 58:10-23.11f(a). This cause of action for treble damages, which may be pursued by the State against parties who are ultimately found liable for necessary cleanup measures, is the central incentive within the legislative scheme to encourage timely and adequate private participation in toxic waste cleanups.*

The circumstances in which the NJDEP utilizes the directive device are well exemplified by this case. After employees at a local restaurant in the Township of West Milford, Passaic County, New Jersey, noticed a strong odor in the water from the restaurant's well, the NJDEP

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*In addition to performing the cleanup measures identified by the NJDEP or refusing to do so, directive recipients also possess a third possible course of action. If the recipient believes that some but not all of the cleanup measures identified by the NJDEP are necessary, the recipient can pay for those activities agreed to be necessary, thereby reducing the dispute between the State and the directive recipient to those measures that the private party believes to be unnecessary and, accordingly, reducing the party's exposure to a cause of action for treble damages.

investigated the nature and source of the contamination. State investigators uncovered a serious ground water contamination problem emanating from two local gasoline stations. One of these stations was owned by S.K.S. Inc., a corporate relative of Kimber Petroleum Corporation ("Kimber"), *see* Jurisdictional Statement at ii, n.*, was leased to Kimber and was subleased by Kimber to the gasoline station's operators to which Kimber supplied gasoline. Gasoline that had escaped the underground tanks at these service stations had already seriously damaged the water supply in one local neighborhood and was headed for a second neighborhood that also relied on local ground water for its drinking water supply.* The levels of contamination uncovered by the NJDEP were exceptionally high. For example, although the State requires the provision of an alternate water supply when concentrations of benzene—a potent carcinogen—reach 6.8 parts per billion (ppb), the water supply in one local residential well was contaminated with benzene at concentrations exceeding 5000 ppb.

Although Kimber, one of the parties seen as liable by the NJDEP, provided carbon filters and bottled water to those residents whose wells were contaminated with gasoline constituents, the NJDEP determined that a long-term, alternate water supply source was necessary to serve both neighborhoods placed at risk from the contamination. After

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*Although the appellant informs this Court that only part of the area to be supplied with a new water system was actually suffering from contamination, Jurisdictional Statement at 2, it neglects to report that the other neighborhood to be served by the new water system was the neighborhood that is downgradiant of the plume of contamination and therefore threatened with contamination.

evaluating a range of water supply alternatives, the NJDEP negotiated a contract with the local municipal utilities authority for the establishment of production wells outside the affected area and the construction of a water distribution system to transport the water to the affected neighborhoods.*

Prior to funding this contract with public monies, the NJDEP sought private financing of the new water system and issued a directive to several parties including Kimber identifying the nature of the contamination and the recipients' connection with the contamination, alleging the liability of the directive recipients under State law and specifying the nature of the remedial activities deemed necessary by the NJDEP. *See* Appendix to Jurisdictional Statement ("JSa") at JSa48 to JSa54. As modified, the directive sought the payment by July 17, 1986 of $1.88 million for the establishment of an alternate water supply in the affected neighborhoods. *See* JSa48 to JSa60. In the absence of litigation, Kimber and the other directive recipients, after evaluating their liability and the nature of the measures sought by the NJDEP, could either comply with the directive, refuse to comply with the directive or make a partial payment in mitigation of the directive. If the directive recipients refused to comply with the directive or paid for only part of the measures sought by the directive, the Department would proceed to fully fund the con-

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*The provision of an alternate water supply to a contaminated area constitutes a valid cleanup and removal expense under the Spill Act, which defines "cleanup and removal costs" to include the "taking of reasonable measures to prevent or mitigate damages to the public health, safety, or welfare . . . ." *N.J.S.A.* 58:10-23.11b(d).

tract and insure that the alternate water supply was provided to the affected neighborhoods. After expending the public monies, the NJDEP would then institute litigation seeking the recovery of the actual costs expended by the State and would also assert a cause of action to recover three times those costs from any directive recipient that failed to address its liability in a timely and adequate fashion.

The exact nature of the cause of action for treble damages that would be possessed by the State was one of the issues in controversy in this matter and has now conclusively been settled by the New Jersey Supreme Court's interpretation of the statutory scheme. Under the federal counterpart to the Spill Act—the Comprehensive Environmental Response, Compensation, and Liability Act, 42 *U.S.C.* § 9601 *et seq.* ("CERCLA")—, a party who refuses to comply with a federal cleanup order "without sufficient cause . . . may be liable" for treble damages. 42 *U.S.C.* § 9607(c)(3). This claim for treble damages under CERCLA has been unformly interpreted by the federal courts to authorize a treble recovery only against those who lack a good faith basis for refusing to comply with the CERCLA administrative order. *See Solid State Circuits, Inc. v. United States,* 812 *F.*2d 383 (8th Cir. 1987); *Wagner Seed Co. v. Daggett,* 800 *F.*2d 310 (2nd Cir. 1986); *Aminoil, Inc. v. United States,* 646 *F. Supp.* 294 (C.D. Cal. 1986); *Wagner Electric Corp. v. Thomas,* 612 *F. Supp.* 736 (D. Kan. 1985); *United States v. Reilly Tar and Chem. Corp.,* 606 *F. Supp.* 412 (D. Minn. 1985). In contrast to the good faith defense plainly contained within CERCLA, the treble damages provision within the Spill Act reads in mandatory terms. *N.J.S.A.* 58:10-23.11f(a) ("[a]ny discharger who fails to comply with such a directive *shall* be

liable to the Department in an amount equal to three times the cost of such removal.'') (emphasis supplied).

In light of the apparent mandatory nature of the Spill Act's treble damages provision, and in the absence of any State decisional law interpreting the provision, the NJDEP defended the constitutionality of the statute in the litigation below on the assumption that any judicial award of governmental cleanup costs was required to be trebled if the unsuccessful defendant had received a directive from the NJDEP prior to the expenditure of the public funds. In sharp contrast with the appellant's arguments to this Court, Kimber urged the New Jersey Supreme Court to engraft upon the Spill Act a good cause defense similar to that contained within CERCLA as a means of insuring the constitutionality of the State cleanup law. *See* Transcript* at A17 (under CERCLA, "treble damages are not mandatory but are discretionary and, two, you have a good faith defense at the post-enforcement proceeding where if, if, if you've acted in good faith you don't get subjected to the treble damage provision. And if there was the same such provision in the Spill Fund Act I think that that would save its constitutionality."); *id.* at A19 ("I think that there can be a penalty [for disregarding a directive] but it shouldn't be mandatory treble damages. It should be discretionary treble damages and, and it should be in cases where there is not a good faith defense.").

Consistent with the urging of the appellant, the New Jersey Supreme Court determined to avoid any doubts

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*Appellee has appended to this motion the complete transcript of the oral argument of counsel for Kimber before the New Jersey Supreme Court. Appellee will provide the entire transcript of oral argument if the Court so desires.

of the constitutionality of the Spill Act's treble damages provision, *In the Matter of Kimber Petroleum Corp.*, 110 *N.J.* 69, 82-83, 539 *A.*2d 1181, 1188 (1988) (hereinafter "*I/M/O Kimber*"), and interpreted the Act to authorize, but not mandate, an award of treble damages against any party found liable for cleanup and removal costs incurred by the State. *Id.*, 110 *N.J.* at 83, 539 *A.*2d at 1188. Specifically, the Court held

> that treble damages need not be assessed if the party opposing such damages had an objectively reasonable basis for believing that DEP's directive was either invalid or inapplicable to it, and that any decision by the DEP to seek treble damages in a recovery action be subject to judicial review as any other agency action. . . . A good-cause defense is relevant only once a company refuses to comply with the DEP directive and DEP moves in court to enforce the directive. In accordance with its directive the DEP in its enforcement action may seek treble damages as a penalty for non-compliance. If the court determines that a company's basis for non-compliance is objectively reasonable, even if the court does not ultimately uphold the company's argument, DEP's request for treble damages may be rejected if not reasonable in light of all the circumstances. [*Id.*, 110 *N.J.* at 83-84, 539 *A.*2d at 1188 (footnote omitted)].

Through its interpretation of the Spill Act, the New Jersey Supreme Court closely aligned the scope of the State treble damages provision with that contained within CERCLA; indeed, the New Jersey Supreme Court's articulation of the good faith exception to treble liability under the Spill Act derived directly from a United States Court of Appeals decision interpreting the treble damages provision in CERCLA. *See id.*, 110 *N.J.* at 77, 539 *A.*2d at 1185 (quot-

ing *Solid State Circuits, Inc. v. United States, supra,* 812 *F.*2d at 391). In light of the uniform decisions of federal courts upholding the constitutionality of CERCLA's treble damages provision, and in light of Kimber's express recognition that the Spill Act would be constitutional if interpreted to contain a good faith exception, the New Jersey Supreme Court apparently had little doubt that the Spill Act so interpreted would satisfy the federal due process clause and the State doctrine of fundamental fairness. *I/M/O Kimber, supra,* 110 *N.J.* at 82, 539 *A.*2d at 1188.

Because of the litigation before the New Jersey Supreme Court, the usual mechanics governing responding to a directive have been slightly altered in this case as a result of interlocutory relief obtained by Kimber. After the Appellate Division of the New Jersey Superior Court refused Kimber's motion for a stay of the directive, JSa44 to JSa45, Kimber moved before the New Jersey Supreme Court for a stay of the directive pending appeal and other auxiliary relief. In response, the Supreme Court on its own motion directly certified the appeal and issued a partial stay of the directive. JSa38 to JSa40. The Court's partial stay extended for thirty days the period in which Kimber was "permit[ted] . . . either to make direct payment to fund costs as required by [the directive]or to furnish a satisfactory bond or other security conditioned upon the payment of said costs in the event the validity of said Directive is sustained on appeal. . . ." *Ibid.* If Kimber paid the costs sought by the directive or posted the satisfactory security identified by the Court, the Court provided that Kimber would be protected from any exposure to treble damages for failing to comply with the directive during the pendency of the motion for a stay and the pen-

dency of the appeal. *Ibid.* In essence, the New Jersey Supreme Court's interlocutory order provided Kimber an extended window of opportunity in which it could evaluate whether to comply with the directive and, if it chose to comply, it would be free of any risk of treble damages. The order also offered an alternative to the cash payment sought by the directive, authorizing the posting of security that would ensure payment if the Court upheld the validity of the directive on appeal.

Although Kimber now conveniently seeks to interpret the New Jersey Supreme Court's interlocutory order as compelling the payment of the requested sums and requiring compliance with the directive, a colloquy between counsel for Kimber and the Court at oral argument makes clear that Kimber understood that the Court's partial stay did not require compliance with the directive within thirty days, but simply sought for Kimber to finalize its response to the directive within the thirty day period. At oral argument, counsel for Kimber requested an extension of the thirty day period, which was about to expire. In response to this request, the following colloquy between the Court and counsel for Kimber ensued:

> The Court: "How are you prejudiced, Mr. Matthews? I don't understand."
>
> Mr. Matthews: "Well if we put up the money at this point we, one,—unless as Justice O'Hern has suggested, we can go to arbitration and then fight about it, we're in the position where the money is put up and is gone and we have no opportunity to get back and we have no opportunity to contest the validity of what the directive is designed to do."

> The Court: "You'd rather be exposed to the treble damage feature for the whole period of time rather than relieved of that?"
>
> Mr. Matthews: "No, I wouldn't, Your Honor."
>
> The Court: "That's the alternative, one of the obvious alternatives of the order."
>
> Mr. Matthews: "I understand what Your Honor is saying and I guess what I'm saying is I think my client would rather, if we could, make the decision when this Court has ruled on the issue."
>
> The Court: "Extend the stay. You would importune us to extend the stay to the date of decision, that is, you don't have to, you don't have to make any payment or deposit or bond until this case is decided? Is that your point?"
>
> Mr. Matthews: "Yes, your Honor, and then, and then if, if we pay then, you know, we've paid knowing what we know at that point. If we don't pay we run the risk." [Transcript at A28 to A29].

This colloquy makes clear that Kimber understood that it was not required to make any payment or post any security within the thirty-day period, but was simply given an extended opportunity to do so. In fact, Kimber sought an indefinite extension of the thirty-day period so that it "could make *the decision* when this Court has ruled on the issue." *Ibid.* (emphasis added). Although paying the monies was "one of the obvious alternatives of the order," *ibid.*, Kimber recognized that it had a decision to make and that it could refuse to pay any sums and remain exposed to a cause of action for treble damages depending upon the outcome of the litigation. Rather than take the risk of that exposure, Kimber determined to comply with the directive through the filing of affidavits by two of its in-

surance carriers pledging payment of the sum sought by the NJDEP in the event the validity of the directive was sustained on appeal by the New Jersey Supreme Court.

In its decision on the merits, the New Jersey Supreme Court ruled that the directive issued to Kimber complied with the Spill Act and was affirmed with the Court's modification of the statutory enforcement provision. *I/M/O Kimber, supra,* 110 *N.J.* at 86-87, 539 *A.*2d at 1190. As the Court explained in the companion case to *I/M/O Kimber,* the directive complied with the Spill Act "but cannot be enforced as issued." *I/M/O J.I.S. Industrial Service Co. Landfill,* 110 *N.J.* 101, 112, 539 *A.*2d 1197, 1203 (1988). In applying this holding to the security posted by Kimber's insurance companies to pay the required monies if the validity of the directive was upheld, the final paragraph of the opinion of the New Jersey Supreme Court makes clear that the insurance carriers were required to comply with the pledges made in the affidavits to pay the promised sums. Specifically, the Court wrote:

> Accordingly, we rule that the DEP directive issued to Kimber Petroleum and Solar Oil threatening treble damages upon noncompliance complies with the Spill Act. The provisions of the DEP directive ordering the payment of removal costs are valid and enforceable subject, however, to any good-cause defense that may be raised by the appellants. Nevertheless, in this case we need not consider further the applicability of a good-cause defense as a basis for denying treble damages because the Court has ordered the parties to pay the remedial costs assessed by the directive or security for those costs and has for purposes of this appeal excused liability for treble damages based upon the earlier failure of the parties to have complied with the DEP directive. The directive of DEP,

> as modified by the order of this Court on appeal, is affirmed. [*Id.*, 110 *N.J.* at 86-87, 539 *A.*2d at 1190.]

Although this concluding paragraph of the Court's opinion leaves little doubt that Kimber's insurance carriers were required to honor their promise to pay the required monies—the promise that had the effect of freeing Kimber from any future prospect of treble damages for the remedial activities—, Kimber moved before the New Jersey Supreme Court for reconsideration. In this motion, Kimber offered a unique interpretation of the New Jersey Supreme Court's interlocutory order and ultimate ruling. As Kimber's moving papers revealed,

> Kimber interprets the Court's opinion and order upholding the directive to mean that it must decide within 30 days (the time set out in the [interlocutory] order) whether it intends to comply with the DEP directive or risk the application of the treble damage portion of the directive. Kimber realizes that if it refuses to pay the amount set forth in the directive or any portion thereof, that it might be liable for treble damages at a post enforcement proceeding.

In the NJDEP's responsive papers on the motion, the NJDEP called to the Court's attention that Kimber's interpretation did not correspond with the language within the Court's interlocutory order or with Kimber's own prior interpretation of the order. *See* JSa38 to JSa40; Transcript at A27 to A30. After considering the matter, the New Jersey Supreme Court denied Kimber's motion for reconsideration.

Dissatisfied with the requirement that Kimber honor the pledge to pay contained in the affidavits of its insurance carriers, Kimber filed on August 22, 1988 a notice of

appeal with this Court from the judgment of the New Jersey Supreme Court and from that Court's denial of the motion for reconsideration. Kimber's jurisdictional statement was formally submitted thereafter. Appellee Christopher Daggett, Acting Commissioner of the NJDEP, urges this Court to dismiss this appeal for want of a substantial federal question meriting plenary review, or to affirm the judgment and order issued in this matter by the New Jersey Supreme Court. In support of this motion, appellee relies upon this brief and appendix and the opinion rendered by the Court below.

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ARGUMENT

PLENARY REVIEW OF THIS APPEAL IS NOT WARRANTED BECAUSE NEW JERSEY'S SPILL COMPENSATION AND CONTROL ACT AS INTERPRETED BY THE NEW JERSEY SUPREME COURT PLAINLY SATISFIES THE FEDERAL CONSTITUTIONAL REQUIREMENT OF DUE PROCESS AND BECAUSE THE NEW JERSEY SUPREME COURT'S REQUIREMENT THAT THE APPELLANT COMPLY WITH ITS PLEDGE TO FUND CERTAIN CLEANUP ACTIVITIES IN NO WAY RAISES ANY ISSUE OF CONSTITUTIONAL MAGNITUDE.

In this appeal, Kimber seeks for this Court to review the constitutionality of the Spill Act as interpreted by the New Jersey Supreme Court as well as the post-judgment order of the New Jersey Supreme Court that requires Kimber to comply with its previous pledge to pay

$1.88 million to the NJDEP for the installation of an alternate water supply. The first of these issues—the facial constitutionality of a treble damages provision that contains a good faith defense—was conceded by the appellant at oral argument before the New Jersey Supreme Court. Furthermore, there can be no fair doubt as to the constitutionality of the Spill Act's treble damages provision because of its similarity to that within CERCLA, which has been uniformly upheld as constitutional by the federal courts. Finally, Kimber's complaint that it is now being required to comply with its prior pledge to pay for certain cleanup activities is hardly the sort of substantial constitutional issue meriting plenary review by this Court because no party other than Kimber will ever be affected by the New Jersey Supreme Court's ruling with respect to this matter and because the New Jersey Supreme Court has simply required that Kimber abide its previous decision to pay the required sums if the validity of the directive under challenge was upheld.

A. The Constitutionality Of The Treble Damages Provision Of The Spill Act As Interpreted By The New Jersey Supreme Court Was Conceded Below By The Appellant And Is Confirmed By Uniform Federal Decisions Upholding The Comparable Treble Damages Provision Contained In CERCLA.

The first issue raised by the appellant is the constitutionality of the Spill Act's treble damages provision, which authorizes an award of three times the cleanup costs incurred by the NJDEP if the NJDEP directed the defendant to undertake the cleanup measures prior to the expenditure of public funds *unless* that party "had an

objectively reasonable basis for believing that DEP's directive was either invalid or inapplicable to it. . . ." *I/M/O Kimber, supra,* 110 *N.J.* at 83, 539 *A.*2d at 1188.* It is highly ironic that Kimber now argues that "adding a good cause defense to the Spill Act modeled after the federal Comprehensive Environmental Response Compensation and Liability Act, 42 *U.S.C.* § 9607(c)(3) (1982), as the New Jersey Supreme Court has done, is insufficient to save the statute." Jurisdictional Statement at 9. After all, it was Kimber that conceded at oral argument before the New Jersey Supreme Court that the engrafting of a good cause defense upon the treble damages provision within the Spill Act would satisfy all constitutional requirements. Transcript at A17. Since Kimber conceded the constitutionality of a treble damages provision under which defendants can assert good faith defenses to treble liability, it has waived its right to argue the constitutionality of that type of statutory enforcement mechanism and cannot properly seek review by this Court of the accuracy of its prior concession. *See Wilson v. Byron Jackson Co.,* 93 *F.*2d 572, 573 n.2 (9th Cir. 1937) (a party may not seek review of a trial concession on appeal); *Andrews v. St. Louis Joint Stock Land Bank,* 127 *F.*2d 799, 804 (8th Cir. 1942) (a party may not seek appellate review of an issue

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*Although the jurisdictional statement filed by the appellant complains at times of the Spill Act's so-called mandatory treble damages provision, see Jurisdictional Statement at 5, 7 and 9, the New Jersey Supreme Court has plainly interpreted the Spill Act to contain a discretionary—rather than a mandatory—treble damages provision. *See I/M/O Kimber, supra,* 110 *N.J.* at 83, 539 *A.*2d at 1188. It is well settled that this Court must abide this interpretation of state law adopted by the highest court of the State of New Jersey. *Hortonville J.S.D. No. 1 v. Hortonville Ed.,* 426 *U.S.* 428, 488 (1976).

waived at trial); *see also Singleton v. Wulff*, 428 *U.S.* 106, 120 (1976) (a federal appellate court will not ordinarily review an issue that an appellant failed to raise below).

Even if Kimber could properly seek review of the constitutionality of the treble damages provision as interpreted by the New Jersey Supreme Court, this issue plainly fails to state a substantial federal question meriting plenary review. The appellant's constitutional theory has its origins in *Ex Parte Young*, 209 *U.S.* 123 (1908), which establishes that a statutory enforcement scheme will violate due process if "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [a party] from resorting to the courts to test the validity of the legislation." *Id.*, 209 *U.S.* at 147. However, all of the federal courts that have reviewed the constitutionality of CERCLA's treble damages provision in light of *Ex Parte Young* and its progeny have affirmed the constitutionality of the federal statute. *See Solid State Circuits, Inc. v. United States, supra; Wagner Seed Co. v. Daggett, supra; Aminoil, Inc. v. United States, supra; Wagner Electric Corp. v. Thomas, supra; United States v. Reilly Tar and Chem. Corp., supra; see also City of Quincy v. Carlson*, 517 *N.E.*2d 33 (Ill. App. Ct. 1987) (upholding the constitutionality of the treble damages provision of the Illinois Environmental Protection Act against a due process challenge made under the *Ex Parte Young* doctrine). This uniform verdict as to the constitutionality of CERCLA's treble damages provision with its good faith exception was explained by the United States Court of Appeals for the Second Circuit as follows:

> *Ex Parte Young*, established that mandatory penalties incurred because a party has chosen to seek judicial review are unconstitutional where "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation. . . ." 209 *U.S.* at 147, 28 *S.Ct.* at 449. "The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties." *Brown & Williamson Tobacco Corp. v. Engman*, 527 *F.*2d 1115, 1119 (2d Cir. 1975), *cert. denied* 426 *U.S.* 991, 96 *S.Ct.* 2237, 48 *L.Ed.*2d 837 (1976). One way of ensuring that a plaintiff is not faced with such unconstitutional penalties was to require that no penalty be imposed where a challenge was brought in good faith. *Oklahoma Operating Co. v. Love*, 252 *U.S.* 331, 338, 40 *S.Ct.* 338, 340, 64 *L.Ed.* 596 (1920) ("[A] permanent injunction should . . . issue to restrain enforcement of penalties accrued *pendent lite*, provided that it also be found that the plaintiff *had reasonable ground to contest* them as being confiscatory") (emphasis added). *Accord Reisman v. Caplin*, 375 *U.S.* 440, 446-47, 84 *S.Ct.* 508, 512-13, 11 *L.Ed.*2d 459 & n.6 (1964); *see also Wagner Elec. Corp. v. Thomas*, 612 *F. Supp.* 736, 742-45 (D. Kan. 1985) (interpreting *Ex Parte Young* and *Reisman*). [*Wagner Seed Co. v. Daggett, supra*, 800 *F.*2d at 315-16.]

The correctness of the uniform holding of the federal courts interpreting CERCLA's treble damages provision is confirmed by prior decisions of this Court upholding treble damages provisions in light of due process challenges based upon *Ex Parte Young, see, e.g., Missouri Pacific Railway Co. v. Tucker*, 230 *U.S.* 340 (1913); *see also Overnight Motor Transp. Co. v. Missel*, 316 *U.S.* 572 (1942) (upholding the constitutionality of the award of double damages

against a due process claim under the *Ex Parte Young* doctrine), even when the multiple damage award is authorized following the refusal of the liable party to meet a reasonable demand for compensation set forth in a written notice. *See Kansas City Southern Railway Co. v. Anderson,* 233 *U.S.* 325 (1914); *Yazoo & Mississippi Valley R.R. Co. v. Jackson Vinegar Co.,* 226 *U.S.* 217 (1912); *Seaboard Air Line Railway v. Seegers,* 207 *U.S.* 73 (1907).

In light of Kimber's concession below as to the constitutionality of a treble damages provision containing a good faith exception, and in light of the uniform caselaw upholding the constitutionality of such statutory enforcement mechanisms, this Court should refuse plenary review of this matter and either affirm the decision of the New Jersey Supreme Court below or dismiss this appeal for lack of a substantial federal question.

B. The New Jersey Supreme Court's Refusal To Release Kimber From Its Prior Pledge To Pay The Sums Required To Respond To Its Release Of Hazardous Substances Raises No Constitutional Issue Of Any Magnitude.

The second issue raised by Kimber in this appeal derives from its discontent with the New Jersey Supreme Court's requirement that Kimber abide by its prior decision to pay the $1.88 million for the establishment of an alternate water supply if the validity of the directive was upheld. As an initial matter, this issue fails to raise a substantial federal question because it derives from the interlocutory relief obtained in this litigation and, conse-

quently, will never apply to any party other than Kimber.* Because the circumstances underlying Kimber's contention will never be repeated, this claim fails to raise the type of substantial federal question meriting this Court's plenary review.

Moreover, Kimber's current claim is premised upon a mischaracterization of the interlocutory order of the New Jersey Supreme Court that provided Kimber with an extended opportunity to pay or post security for the $1.88 million for the alternate water supply. As indicated *supra,* the New Jersey Supreme Court simply permitted Kimber an additional 30 days within which it could either pay the required monies or post a satisfactory security that would ensure payment if the validity of the directive was upheld. When Kimber made its decision to post the affidavits of its insurance carriers promising payment if the validity of the directive was upheld, it clearly understood that it was electing one of the alternatives available to it. Once Kimber made its decision and elected to provide the pledges of its insurance carriers to pay if the validity of the directive was upheld on appeal, it cannot fairly complain that the New Jersey Supreme Court has required that it comply with that pledge.**

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*As Kimber has informed the Court, the only other party to which the partial stay applied—Solar Oil Sussex, Inc.—failed to take any action to comply with the directive in the extended window for a response provided by the New Jersey Supreme Court. See Jurisdictional Statement at 10, n.2.

**Indeed, Kimber's current theory that the interlocutory order of the New Jersey Supreme Court required the payment of the necessary monies is inconsistent with their asserted posi-

(Continued on following page)

Because the New Jersey Supreme Court's requirement that Kimber honor its pledge to pay the sums promised in the affidavits supplied to the NJDEP fails to raise any issue of substantial federal importance, and because the New Jersey Supreme Court fairly and properly required that Kimber abide by its prior election of alternatives, this Court should refuse plenary review of the decisions of the New Jersey Supreme Court and should either affirm those actions or dismiss this appeal.

—o—

CONCLUSION

It is respectfully submitted that for the foregoing reasons this appeal should be dismissed or the judgment and order of the New Jersey Supreme Court affirmed.

(Continued from previous page)

tion before the New Jersey Supreme Court when seeking reconsideration of that Court's decision. In its motion, Kimber interpreted the interlocutory order as providing it an opportunity after issuance of the Court's opinion to determine how to respond to the NJDEP directive. By contrast, in the current appeal, Kimber has revised its position to claim that the interlocutory order compelled payment of the disputed monies, a position clearly at odds with their prior claim that they still retain a choice as to how to respond to the NJDEP directive.

Respectfully submitted,

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Dated: October 13, 1988

(p. 1) THE SUPREME COURT OF NEW JERSEY

Docket Nos. A-126, A-127 and A-128

re: IMO DIRECTIVE OF DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM, etc.,	TRANSCRIPT OF PROCEEDINGS
and	November 18, 1986
re: IMO J.I.S. INDUSTRIAL SERVICES LANDFILL, et al	

IN ATTENDANCE:

CHIEF JUSTICE ROBERT N. WILENTZ
JUSTICE ROBERT L. CLIFFORD
JUSTICE ALAN B. HANDLER
JUSTICE STEWART G. POLLOCK
JUSTICE DANIEL J. O'HERN
JUSTICE MARIE L. GARIBALDI
JUSTICE GARY S. STEIN

APPEARANCES:

EDWIN R. MATTHEWS, ESQ., for Appellant, Kimber Petroleum

EDWARD J. FARRELL, ESQ., for Appellant, Solar Oil Company

JAMES E. STAHL, ESQ., for Appellant, J.I.S. Industrial Service Company Landfill

ROSS E. LEWIN, D.A.G., for Respondent, Department of Environmental Protection

(p. 2) CHIEF JUSTICE WILENTZ: The first matter is A-127 and A-128, In the Matter of the Directive of the New Jersey Department of Environmental Protection issued to Kimber Petroleum Corporation, Shell Oil—Shell Company and Solar Oil Company and A-126, IMO J.I.S. Industrial Service Company Landfill.

Mr. Matthews?

Mr. Matthews: Thank you, your Honor. Your Honor, may Mr. Farrell and I reserve a total of six minutes for rebuttal between the two of us?

Chief Justice Wilentz: Right on the button, six minutes.

Mr. Matthews: We figure that was easier to divide than five.

Chief Justice Wilentz: Okay.

Mr. Matthews: Good morning. My name's Edwin Matthews and our firm is counsel to Kimber Petroleum in this matter.

What—I guess what I'd like to do is indicate to the Court what I think this is not. This is not an appeal on the merits. Essentially the record that we have before the Court is totally inadequate for the purposes of showing what has transpired here below. This appeal raises the fundamental issue of whether the Department of Environmental Protection has the ability to issue direc-(p. 3)tives to parties who are refusing to give them a pre-enforcement hearing and while refusing to give them a hearing subsequent in which they can show good faith defenses for their noncompliance with the directive issued by the De-

partment. It's in essence a civil rights case. It's not an environmental case and it's a civil rights case because of these two reasons: the fact that we do not have a pre-enforcement hearing and the fact that we do not have a, a post-enforcement hearing in which there can be good faith defenses for noncompliance coupled with the mandatory treble damage provisions of the Spill Fund Act.

Chief Justice Wilentz: You mean an unconstitutional proceeding or a failure to give your client due process?

Mr. Matthews: Yes, your Honor. It's a procedural due process—

Chief Justice Wilentz: Due process in, in cleaning up pollution or in the procedures and mechanisms that go in that direction. I'm not quite sure how it becomes civil rights.

Mr. Matthews: Because the client, as, as any party that is the, the recipient of a directive from the State—

Chief Justice Wilentz: Is entitled to due process.

Mr. Matthews: Is entitled to due process and (p. 4) the fact that we are—

Chief Justice Wilentz: You would equate due process with civil rights in, in that sense?

Mr. Matthews: Yes, I would, your Honor.

Chief Justice Wilentz: Alright. Fine. Well I didn't know it was a civil rights case until quite recently.

Mr. Matthews: It's—this is an appeal by two of the three named respondents in this case who are only two of nine potentially responsible parties at the site in West

Milford where there are three gas stations and there's a combination of at least nine people who are or should be responsible parties. The—it's our feeling that the actions of the DEP in issuing its directive are so fundamentally unfair that this Court should step in and, and afford the parties their due process rights.

The Court: Do you think it's just a question in a case such as this where the DEP has abused its discretion by being too selective in terms of focusing on an alleged responsible party and leaving others out?

Mr. Matthews: It's not just that, your Honor. I think that that's just one of the examples of the fundamental unfairness of what the DEP has done.

The Court: Would you be contending that the directive in this case would be fundamentally unfair if all nine alleged responsible parties had been the subject (p. 5) of the order for costs and treble damages?

Mr. Matthews: Absolutely, your Honor. I think that we are entitled to a pre-enforcement hearing in which the DEP has to justify to some extent its actions.

The Court: So then it is not simply the broad authority under the statute whereby DEP could select one or several of many responsible parties to be the target of its enforcement orders but the absence of any pre, as you say, pre-order hearing that, that you say goes to the question of fairness?

Mr. Matthews: Yes, your Honor. It's, it's a combination of things. It's not, for example, the strict liability. It's not the joint and several liability. It's not the punitive damages. It's, it's rather the combination of all of

these factors when taken together that makes the act unconstiutional with a lack of a pre-enforcement hearing and with a lack of a good faith defense to the failure to comply.

The Court: Well let's take one thing at a time. You would agree, no matter how painful it is, that the concept of joint and several liability if mandated by the Legislature would withstand constitutional scrutiny?

Mr. Matthews: I, I would agree with that, your Honor. As unhappy as I might be with that concept I would have to agree that the concept is constitutional.

(p. 6) The Court: And that there is a remedy here through this arbitration process.

Mr. Matthews: There is—Judge, that's what, what Judge Brotman said in Woodlands but that's not true. If you are a potentially responsible party, if you are the party who may be a discharger and may be liable under the act, you don't have the right under—

The Court: Don't the two ideas intersect? In other words, if it is found that you were not responsible, that your pollution did not cause the condition, should not the arbitrators direct the return of your funds?

Mr. Matthews: Yes, Judge, but, but that's not the problem, your Honor. It's a broader problem because you can be a discharger, as that term is defined in the act, without in any way being responsible for the pollution. If you are the owner of the property you can be—

The Court: That's correct. But, I mean, but the statute makes the owner liable to clean it up.

Mr. Matthews: That's correct, your Honor.

The Court: So, where are we going? In other words, if in the hearing the only issue that would save you can be decided by a fair tribunal, how have you been hurt?

Mr. Matthews: Judge, where in—I'm—

Chief Justice Wilentz: Your complaint is that (p. 7) if you're a discharged under this law you're responsible and that, therefore, at the end of the line when you go and you say, "I didn't do it. I want to get my money back", the arbitration board will not give you your money back because you're a discharger.

Mr. Matthews: That's correct.

Chief Justice Wilentz: But your real complaint there is the fact that you have become liable under the statute by virtue of being a discharger.

Mr. Matthews: My, my complaint is not—

Chief Justice Wilentz: But why should you get your money back if the Legislature has, with authority, made you liable?

Mr. Matthews: But, your Honor, the question then becomes, "What am I liable for?" Am I liable for what the DEP arbitrarily decides I am liable for or am I liable for, for, for cleaning up a pollution problem?

The Court: Well let's assume that the arbitrators are able to decide that because the language of the statute appears to give them the discretion or the ability to decide whether the amount is appropriate.

Mr. Matthews: Your Honor, I, I don't think that's the way the DEP interprets the statute and I'm not—

it's not clear in my mind that we would have a right as a discharger to have a hearing at an arbitration proceeding (p. 8) in which we would be able to raise issues of the efficacy of the order.

The Court: You mean the arbitrator can't determine the cost?

Mr. Matthews: Pardon, your Honor?

The Court: Is your point that the arbitrator cannot determine the cost, that's not one of the things in issue that he would make a determination about?

Mr. Matthews: That's correct, your Honor.

The Court: That's fixed when you go into arbitration?

Mr. Matthews: It's fixed when you go into arbitration. We're essentially—

The Court: Well, excuse me, doesn't the statute state that the board shall be convened when persons alleged to have caused the discharge, the administrator or other persons can test the validity or amount of damage claims or clean up and removal costs presented to the fund for payment? That's what the statute says.

The section, counsel, is 58:10-23.11N.

I'm not suggesting it's definitive. I mean, it just appears to me to suggest that those arbitrators would have the ability to decide the validity of the clean up costs because it is possible that there may be exaggerated and inflated costs that have been attributed to a party (p. 9) or even inappropriate.

The Court: Counsel, can I—what exactly, if there were a hearing, what exactly would you, would you be trying to prove. That, I think if you told us that even though we're not in the merits it would help me to understand what—

Mr. Matthews: Your Honor, we're in a very difficult position because we right now don't know why DEP did what they did, what the justification for this directive is, what the reasoning is for their saying to us, "Give a brand new water system to, to—

The Court: Greenbrook.

Mr. Matthews: —Greenbrook", when Greenbrook has had a water system that's, that's been a problem to DEP for at least the last six or seven years. It's been in litigation in receivorship before Judge Dwyer for that time. It's been a totally bankrupt, in all respects, water company. Now they're saying, "Go give them a new water system". We ask, "Why?" There's no answer. We don't have any way to find out why they're telling us to do what they're telling us to do.

The Court: Well wouldn't the question of the validity of the directive and the cause as well as the amount be a subject for arbitration and if it would be your position that there is no factual basis for that par-(p. 10)ticular order why wouldn't that be an issue that would be available to the arbitrator?

Mr. Matthews: Judge, I—my understanding and, and, and I'll be honest, maybe I went in with a, with a total misunderstanding of this act. My understanding was that we were clearly not entitled to the arbitration proceeding.

The Court: At all.

Mr. Matthews: At all.

The Court: Simply because you are "a discharger".

Mr. Matthews: If you are a discharger. And that under those circumstances we've got to have an ability through a pre-enforcement hearing to find out—

Chief Justice Wilentz: You mean, you thought that at the end of the line you couldn't challenge anywhere the amount of money that you had to give to DEP?

Mr. Matthews: That's correct, that we could not challenge.

Chief Justice Wilentz: Anywhere.

Mr. Matthews: Anywhere.

Chief Justice Wilentz: At neither a pre-enforcement nor a post enforcement?

Mr. Matthews: That's correct, your Honor.

Chief Justice Wilentz: If you thought that the arbitration proceeding would be required to consider both (p. 11) liability and amount of liability you'd look at this perhaps somewhat differently?

Mr. Matthews: I think that's correct, your Honor. Then I think we would have to examine it but I don't think that that necessarily saves the act because I think as a matter of, of—as (Name indiscernible) says, we're entitled to that hearing pre-enforcement.

Chief Justice Wilentz: Would you like the statute better if it had just a regular straightforward treble dam-

age clause, no, no directive. You don't have to put money up but at the end of the line you get treble damages—you have to pay treble damages.

Mr. Matthews: Treble damages though for what, your Honor?

Chief Justice Wilentz: For the damage done by your discharge.

Mr. Matthews: Judge, again there's problems with that because if, if I am "a polluter", and went in the middle of the night and did a dumping that might be fair because—

Chief Justice Wilentz: Well for a moment—

Mr. Matthews: —I'd be punished—

CHIEF JUSTICE WILENTZ: For a moment let's talk about not what's fair but what the Legislature has the power to say. Do you have any question but that the Legis-(p. 12) lature has the power to render you liable for the damages you cause, strictly liable, without proof of negligence for damage caused by your discharge of the extra hazardous material?

Mr. Matthews: I don't think in all cases that it can be done that broadly.

Chief Justice Wilentz: In other words, you have some doubt about the underlying power of the Legislature that imposes no fault liability on polluters?

Mr. Matthews: Judge, it's—the problem is, is it's not no fault in, in, in, in the sense of, of, of an automobile case. It's no fault in a greater sense. In an automobile case—

Chief Justice Wilentz: It's no fault in the sense that you have either control over these products or you have property where you've allowed people to have control over these products and the Legislature has said, "Under those circumstances, we don't care how it happens but if those products cause damage you're liable". Do you find difficulty with that?

Mr. Matthews: Judge—Justice, what I find the difficulty with is that doesn't include all of the dischargers. If I'm, if I'm the—

Chief Justice Wilentz: Well let's assume, let's assume the Legislature has said, "You're liable and so (p. 13) are others liable who discharge and you'll be jointly and severally liable as far as the injured party is concerned and you can arrange contribution between and among each other". Any problem with the Legislature's power to do that?

Mr. Matthews: Not if it's done in a way so that my right to contribution is a meaningful right.

Chief Justice Wilentz: Well you'll have the same meaningful right that other people have. If the person you're entitled to get contribution from doesn't have any money, you're liable not to get the contribution, I guess.

Mr. Matthews: I understand that, Judge, but not necessarily where I am in a situation where I've got to go chase everybody else and, and—

Chief Justice Wilentz: You think you are entitled to special treatment by way of contribution doctrine?

Mr. Matthews: I think, Justice, that my, my problem is that the, that, that the statute does not make it

clear how the contribution thing will work. If I end up putting up the whole 2.1 million dollars and then I chase the other nine people and I end up with five of them who are insolvent or absconded or they're gone,—

Chief Justice Wilentz: That could happen at the end of litigation too though, couldn't it? I mean,—

Mr. Matthews: I understand that, Judge, but, (p. 14) but we're then arguing in a normal contribution case—

Chief Justice Wilentz: Well let, let me find that again. Let's assume that the kind of liability I spoke of would be constitutionally within the power of the Legislature and let's assume that they have no treble damage and no notification, no business about having to put up the money for the cleanup. They just sue you. The State, let's say, under the statute has the right if it cleans up to sue you for the damage or one of the neighboring property owners could and they sue you, you'd have to pay ultimately. You could look around for contribution. Do you have any problem with the proposition that the State could, in that statute, provide for treble damages?

Mr. Matthews: Judge, Justice, in, in, in the statute they've provided for the right to sue and they didn't provide for a treble damage.

Chief Justice Wilentz: I'm, I'm not now talking about the statute.

Mr. Matthews: I understand that. I think that you could not broadly put a treble damage provision in the way this act is applied.

Chief Justice Wilentz: Forget about the way this act is applied. Let's assume there's another act that

simply makes you liable for polluting, for discharging and it provides ordinary lawsuit and you have to pay treble (p. 15) damages.

Mr. Matthews: If, if you are in fact the polluter, the person who makes the discharge?

Chief Justice Wilentz: You're the discharger. Maybe you're also just the landlord who allowed someone to come onto the property to do it but you knew in advance that that action on your part might render you liable.

Mr. Matthews: Justice, I would still have problems with the act because there, there would be a class of people who would end up being made to pay treble damages who are totally innocent persons.

Chief Justice Wilentz: Totally innocent in the sense that they were not the actual dischargers?

Mr. Matthews: That they were not the actual discharger. They had no notice of the discharges. They just happened today, thirty years after something was disposed of in 1950—

Chief Justice Wilentz: Now you're talking about the problem that arise in such a statute when the damages were all caused before the date of the statute.

Mr. Matthews: It's, it's, it's it's not just that, your Honor, but when the statute was—I'm sorry. When the discharge was done, if we're going to call it a discharge, it was the disposal, let's say, of waste in a responsible manner in conformance with the law at the (p. 16) time. Subsequent technology now says that discharge or that action has polluted the environment. I have no problem

with the concept of holding the people responsible who did it but to say that they should be subjected to treble damages when their actions conformed in all manners and respect to, to, to the law at the time, I have a difficulty with it.

Chief Justice Wilentz: If they could be subjected to treble damages. Forget about the innocents who one doesn't want unfairly to subject to liability, but let's assume we have someone that you agree could be subjected to treble damages. Do you have any doubt about the State's ability to forego a treble damage remedy if the party is willing to put up the money up front to clean up the discharge.

In other words, if the State says, "You can be relieved of your treble damage responsibility if you will put up X hundred thousand dollars and we will allow you later to litigate that amount".

Mr. Matthews: I guess I'd have problems with it but it's probably constitutional.

Chief Justice Wilentz: Isn't that what this statute could be looked at as doing? Giving up the treble damage remedy on condition that someone puts up the money front?

(p. 17) Mr. Matthews: I don't think so, your Honor, because under the, the, the example that your Honor used presumably there would be a negotiation in which there would be a bargaining. There's no bargaining in here.

Chief Justice Wilentz: The statute has taken care of the bargaining.

Mr. Matthews: Well, no, it hasn't taken care of the bargaining, your Honor. The statute actually gave the DEP two courses of action. They could clean up or ar- State's ability to forego a treble damage remedy if the range for the cleanup, or they could direct us to clean up or arrange for the cleanup. That's not even what they did here. What they did was they arranged for the cleanup and directed us to pay the money to do that so that they really didn't even do what the statute allows them to do.

Chief Justice Wilentz: Are the damages here in this case all—do they all predate—in other words, do the discharges all predate the day when the treble damage aspect of the law became effective, the discharges themselves?

Mr. Matthews: No, your Honor. Some, some of the discharges clearly post-date the statute. Whether some of them predate—

Chief Justice Wilentz: The treble damage, the treble damage part of the statute.

Mr. Matthews: Yes, your Honor.

(p. 18) Chief Justice Wilentz: They post-date it?

Mr. Matthews: Yes, your Honor. They're, they're apparently and, and again I'm saying this based on a relatively incomplete record, but it apparently is clear from what I know that in 1984 when this problem was first discovered at one of the sites in West Milford, there was a leaking tank at that time and that tank was removed.

The Court: Counsel, doesn't the State seem to take the position that treble damages really apply to so-called recoverable costs and it argues in its brief that in the cost recovery proceeding, that's the arbitration proceeding presumably, you would be in a position to argue that the

costs that were assessed were unreasonable in some amount and it would only be the costs that are ultimately determined to be reasonable that treble damages would refer to? And it suggests that if, for example, you are one of several responsible parties, it's within your power to make a determination as to how much might reasonable be assessed against you, pay that amount and if you're correct you would not be responsible for treble damages. If you're incorrect in any amount treble damages would only be applicable with respect to that, that amount.

Mr. Matthews: Your Honor, I think your analysis is correct but the problem is that's a heck of a gamble for me to have to take knowing—I got a directive today. (p. 19) Thirty days from now I've got to make a decision. DEP doesn't tell me why they issued the directive. They don't tell me the basis for the directive. They don't tell me any of the underlying reasons that justify the directive. They just say to me, "Pay me two and a half million or 2.1 million dollars". How can I make an informed judgment as to, to what would be a recoverable cost in a cost recovery action and what wouldn't be? If I make a decision today to pay a million dollars because I think that that's probably what I would be responsible for based on what I know and it's a 2.1 million dollar directive and I'm off by $400,000.00 my client—when I say I, I mean the client, it's already cost them more money and they've gambled because they were wrong and they've lost. And we're not, I don't think within the constitutional framework and ex parte Young (sic), we're not required to make that uniformed decision. We're not required to take that gamble and we're not required to, to, to be put in that position.

The superfund statute, the federal statute, is very, very similar in nature but what saves that statute is the fact—there's two things, three things actually. One, they can give you the directive, the 106 order in an emergency situation where there, where there's a threat to health, safety and welfare. Under those circumstances they don't give you the hearing, the pre-enforcement hearing. (p. 20) But, but there's the emergent situation. There's a finding specifically of the emergent situation.

In that case if you don't comply with the directive you get two things. One, treble damages are not mandatory but are discretionary and, two, you have a good faith defense at the post-enforcement proceeding where if, if, if you've acted in good faith you don't get subjected to the treble damage provision. And if there was the same such provision in the Spill Fund Act I think that that would save it's constitutionality.

Chief Justice Wilentz: But this, this gamble that you take, the State could relieve you of the gamble by simply having a treble damage statute. You'd have no gamble at all. Your gamble would be going into the business of dealing in materials that could lead to treble damages. The State, one might argue, as I think the DEP is arguing, has in effect given you a change to reduce your gamble or at least perhaps to cut it down. The State has made the decision that instead of the maximum deterrents against the spills that, I guess, a treble damage statute with no out would give to the people of the State, it opted for a statute that might bring some money up front so there could be greater efforts to clean up sooner rather than later. And, and it did that through this treble

damage device where you can buy your way out of treble damages (p. 21) by putting up that money. You see, it's hard for me to understand why if the State can require treble damages at the end of a lawsuit, why it cannot do what is essentially a lesser act of compulsion on you?

Mr. Matthews: Justice, I'm not sure they, they could require treble damages in the context of this statute as a flat requirement.

Chief Justice Wilentz: For the same reasons that you mentioned before, I gather?

Mr. Matthews: But I think what we have to do is we have to say, "Why is treble damages here?" If the State had enacted a statute and said, "Kimber Petroleum, you cannot challenge the efficacy of any directive issued by the DEP", period, I don't think anybody in this room would have problems with that statute being unconstitutional. It says you may not have a judicial review at any time of an action of an agency and ex parte Young and all of those cases make that clear. What they've done here is they've, they've—they haven't done that but they've effectively done that by saying, "It's going to cost you three times to try and litigate that issue. If you want to challenge the DEP, if you want to be bold enough to do it, it's going to cost you three times what your real liability should be which is the cost of cleanup".

Chief Justice Wilentz: They could have said, (p. 22) "You're going to pay three times, period".

Mr. Matthews: I'm not sure they could have, your Honor. But, but that's not what they've done here. They've

enacted a treble damage statute to try and coerce people into cooperate—

Chief Justice Wilentz: Putting money up front.

Mr. Matthews: It's not a matter of putting money up, up front, your Honor. They—

Chief Justice Wilentz: I mean, that's the purpose, isn't it? I'm not suggesting that makes it right but that is the purpose, is to get more money so there can be more cleanup sooner rather than later.

Mr. Matthews: That may be the purpose but if that is the purpose and if we accept that as the purpose it still doesn't justify their conduct and their actions. It doesn't make the statute constitutional.

The Court: If the State has the right to insist upon the immediate posting of costs what would prevent an alleged discharger or responsible party from disregarding that directive if there aren't treble damages or some other penalty that could be affixed if costs were not put up?

Mr. Matthews: Justice Handler, I think that there can be a penalty but it shouldn't be mandatory treble damages. It should be discretionary treble damages and, and it should be in cases where there is not a good faith (p. 23) defense. The interesting thing is—

The Court: Then those issues, however, would be the subject of post-proceeding litigation and wouldn't that suggest that in a lot of cases a lot of responsible parties would not put up costs and prefer to take their chances in a later litigation?

Mr. Matthews: It might, yes, your Honor. But, but that's not unjustified. Again if the DEP were to give you your pre-enforcement hearing and explain to you the justification you're then in a position to make a rational decision.

Chief Justice Wilentz: And that's what the DEP is worried about is when is the then? That's what the Legislature is worried about. They do not want these things to the extent they can constitutionally arrange it, to get determined five years later after all of the spill has done all of its damage.

Mr. Matthews: And if a party acts in bad faith in refusing to put up the money, then five years later they should be hit for treble damages and with other penalties.

The Court: Mr. Matthews, tell me, what is it you want the DEP to explain to you?

Mr. Matthews: I'd like them to explain to me how they arrived at what's, what's to be in the directive, (p. 24) what's the justification for it. Is there a scientific basis in fact for including Greenbrook.

The Court: Forgive me. Did you finish it?

Mr. Matthews: Justice, all I wanted to indicate was that, that I've talked to people who seemed to say that in fact there is probably a natural barrier that would prevent any pollution in the Standsby Court area from ever going to Greenbrook. That's apparently something the DEP's never considered.

The Court: I guess my question is, is this. I'm curious as to how it works out in the real world. The DEP issues

an order to your people. Don't you talk to them? You know, this is government. Don't you go over there—

Mr. Matthews: Justice Clifford,—

The Court: "What are you hitting me with all this money for? Give me an explanation", and don't they give it to you?

Mr. Matthews: The very day—

The Court: You may not be happy with it but isn't that the way it works?

Mr. Matthews: The very day I became retained in this matter I sought a meeting with the DEP and I had a meeting with the DEP and they virtually answered no questions. We sent to—

(p. 25) The Court: Are you saying they stonewalled you? They wouldn't answer any questions?

Mr. Matthews: In essence. Justice Clifford, we sent a letter—when I say we, the three respondents in this letter—and it was sent by Mr. Warren, Bill Warren, sent a letter to DEP which requested answers to fifteen specific questions that we had as to this directive. That letter was sent I believe in July. I have the letter here. I could find it. We still have not had a response to that letter.

The Court: Well have you gone down and knocked on their door? I mean the kind of money you're talking about here I would think it might not be too difficult to get a meeting with some assistant commissioner, maybe even the commissioner, somebody who would presumptively be in a position to furnish information. Have you tried that?

Mr. Matthews: Justice Clifford§ we've asked for meetings and we end up with people who basically say —they listen to us. They're very nice but we have to go back and talk to our people. The one of the things that we were specifically told and I said at one of the first meetings, "We'll put up the money. We'll put up the 2.1 million dollars. Let's have a consent order and we agreed in that consent order that at some time at (p. 26) proceeding subsequent to this we get the right to challenge the efficacy of your order and have a judicial determination on whether that order was proper", and if—

The Court: No one has ever told you how they arrived at the sum covered in their directive?

Mr. Matthews: Justice, there is a report from BCM that seems to have figures on it but if you read that report it talks about the new water system in Standsby Court and says it would be $275,000.00. When you talk to the DEP representatives they say, "Well it's really a million and half or a million one, a million two".

The Court: So you're telling me DEP has never explained to you how they arrived at the sum that's the subject, potential subject of treble damages?

Mr. Matthews: That's one of the things they've never explained to me.

The Court: You've never received a breakdown?

Mr. Matthews: Other than the BCM report which is part of the appendix.

The Court: Which they disavow, which they disavow?

Mr. Matthews: Well they haven't—

The Court: Well I'm trying to find out, is the B— have you or have you not received a breakdown? You're saying, "Yes, we did from BCM but, no, DEP doesn't believe it".

(p. 27) Mr. Matthews: Well it's not they don't believe it. It's that when you try and pin them as to certain things in the BCM report, why is this here and why is that here, then, then they kind of shift and one of the biggest examples is the $275,000.00 for Standsby Court. When you talk to DEP about that and I've had a number of conversations with Mr. Lewin, the Deputy Attorney General, we're told it isn't $275,000.00 for the Standsby Court water system. It's really like a million one or a million two.

The Court: Did they tell you how they arrived at that one, one or two million dollars?

Mr. Matthews: No, your Honor,—

The Court: Not at all?

Mr. Matthews: —they haven't told us that.

The Court: Not at all?

Mr. Matthews: Not at all.

The Court: I'm not asking you now whether they satisfy you the way they got to the 1.2 or whatever it is is okay with you and your people buy it. Have they explained it whether you completely reject it out of hand or no. Have they explained to you how you get that number?

Mr. Matthews: No, your Honor. And that's the problem. If we knew how everything was arrived at and

if we knew the justification for this we could then make (p. 28) an informed decision as to whether or not we should pay the, the 2.1 million dollars.

The Court: Mr. Matthews, assume that that statute that Justice Ohern called your attention before, the arbitrators power to grant review, supposing that applies in this case and so you're entitled at some point to a determination by the Board of Arbitrators convened by the administrator as to whether or not an assessment against your client is valid. The statute speaks of validity. And whether or not the amount required to be expended was proper and that arbitration proceeding was available to you. Does that solve your problem with the statute?

Mr. Matthews: I don't think it does, your Honor, and I'd like to read and I'll read while others are arguing that portion of the statute. And I don't think it does because we are still entitled to have a pre-enforcement hearing. We've asked DEP that. They've denied it. We're entitled to that.

The Court: Your problem being that to the extent that you have that hearing before the arbitrators if you lose that you're at risk for treble damages as to the amount by which you underestimated what you should put up so that what you're saying to the Court is that the statute requires you to pay first and fight later and if you don't pay then you're liable for treble damages to the extent that you (p. 29) underestimate what you should put up.

Mr. Matthews: Yes, your Honor, but it's even more important and this gets into the whole question of the

arbitariness of the way the statute's being applied, the State says in their brief if I put up a million dollars I'm only going to be subjected to treble damages on the other 1.1 million and the directive is actually 1.8 million now. So if I put up a million I'm only going to be subject to treble damages on the $800,000.00. But the statute doesn't say that. That's apparently the interpretation now being given by the, the DEP and the Attorney General's office.

Chief Justice Wilentz: You think the statute might be interpreted to require you if you lose to be liable for three times 1.8 million even though you put 1 million up?

Mr. Matthews: I would hope not but what I'm saying is that the statute is unclear on that and I could be faced two years from now in a case with a new Attorney General and a new commissioner over at DEP who decide that that is their position and I could be litigating that issue and the statute should be clear on that.

The Court: Do you make any point of the fact that the statute only gives the DEP authority to direct you to clean it up and not to direct you to put up money?

(p. 30) Mr. Matthews: I, I take—

The Court: And does that, does that make—does that have any effect on the validity of the treble damage provision. The treble damage provision, as I understand the statute, says this, "If you don't comply with a directive to clean up or arrange for the cleanup then you're liable for triple the cleanup costs". It does not say, read literally, that if you don't put up money that the DEP asked you for you're liable for three times that amount. In fact the statute doesn't purport to give the DEP au-

thority to direct you to put up money. Does that distinction, the fact that their directive is not literally auhorized by the statute have any bearing on your claim that the statute's unconstitutional?

Mr. Matthews: I don't think it does because one, my view is that just shows another one of the arbitrary ways in which the DEP is applying the statute. But if this Court were to say to them, "You can't do that. You have to direct them to clean it up or you have to direct —you clean it up yourself and then, and then bill them", and incidentally in that second procedure, of course, we'd have the full right to litigate the issues, but what would happen is they could turn around presumably and take the very directive they have and say, "There's the cleanup. Go do it". And again I don't think that they should have (p. 31) the right to do that. If they tell us to clean it up we should go in. We should do a study and then make a decision on the cleanup. One of the problems that we have here is we've put the cart before the horse on the cleanup. We have a plume here that's been there for two yars. They're saying, "Put in a new water system", and now in September or the end of August they come to us and say, "By the way, if you want to talk about cleaning up the plume we're willing to listen to you". So we're going to spend 2.1 million dollars to put in a new water system, then we're going to clean up a plume and when that plume is cleaned up we may find out we didn't need the water system.

The Court: But they say that there are people now who don't have an adequate water supply. They can't drill wells because of the threat of contamination and

there is a present problem that, that requires some immediate attention.

Mr. Matthews: Justice Handler, they say that but, but I'm not sure that's a genuine argument. The people that they make that argument as to, and there's two groups of people. There's the people in Standsby Court and the people in Greenbrook. In the case of the people in Greenbrook, they've had that problem for seven, eight, nine years and it has nothing to do with the problem here.

(p. 32) The Court: They disagree with that. They say that this plume which is advancing in a certain way with certain carcinogens exacerbates that problem.

Mr. Matthews: They say that, Justice Handler, but there's nothing in the record, I submit, that shows that the plume is moving in that direction. The plume was plotted once fifteen or eighteen months ago and has never been plotted since. There's no evidence that the DEP has that shows that that plume is moving towards Greenbrook Estates.

Chief Justice Wilentz: Does the Court have any further questions of Mr. Matthews? Any further point you want to make now, Mr. Matthews?

Mr. Matthews: Yes, your Honor, just one additional point that I would like to make. The order that this Court entered on, on October 20th, 1986 required that within thirty days of that order we should put up the money or put up a bond in order to maintain, presumably, the status quo. If—and that's to be done in the next few days. If we are required to do that we will lose the one remedy that the State says that we have under this case which

is the refusal to pay the money and then get into a cost recovery action in which we can fight about whether or not the cleanup was proper. What I'm saying, in essence, is that if we're required to put that money up now we will (p. 33) —and we aren't—we don't prevail on our, our appeal before this Court, we would be in a worse situation than we would have been in the day that we got the directive because we will no longer have the choice of refusing to, to pay the money and going through this proceeding which we may be subjected to treble damages. And for that reason I would ask that the Court consider extending that stay or the requirement for us to put the money up until such point as, as it's ruled on the issues in this case.

Chief Justice Wilentz: The purpose of the order was to relieve you of the risk of treble damages for having refused to put up the costs or a bond as had been added by the order. But aside from that relief the Court has taken the position that on an interim basis, balancing the interests involved, that to the public as well as to the litigants, that the costs have to be put up.

Mr. Matthews: I understand that, your Honor, and, and what I'm suggesting is that we end up being penalized losing the one remedy that would have had.

The Court: How are you prejudiced, Mr. Matthews? I don't understand.

Mr. Matthews: Well if we put the money up at this point we, one,—unless as Justice Ohern has suggested we can go to arbitration and then fight about it, we're in the position where the money is put up and is gone and (p. 34) we have no opportunity to get back and we have

no opportunity to contest the validity of what the directive is designed to do.

The Court: You'd rather be exposed to the treble damage feature for the whole period of time rather than relieved of that?

Mr. Matthews: No, I wouldn't, I wouldn't, your Honor.

The Court: That's the alternative, one of the obvious alternatives of the order.

Mr. Matthews: I understand what your Honor is saying and I guess what I'm saying is I think my client would rather, if we could, make the decision when this Court has ruled on the issue.

The Court: Extend the stay. You would importune us to extend the stay to the date of decision, that is, you don't have to, you don't have to make any payment or deposit or bond until this case is decided? Is that your point?

Mr. Matthews: Yes, your Honor, and then, and then if, if we pay then, you know, we've paid knowing what we know at that point. If we don't pay we run the risk.

Chief Justice Wilentz: Thank you, Mr. Matthews.

The Court: On the other hand, if I may, Chief Justice,—

(p. 35) Chief Justice Wilentz: Yeah.

The Court: —if you were satisfied that the availability of the arbitrators to a hearing applies in your case even if you put up the money, then you're not exposed to that risk. Then you have the opportunity subsequently

to have a hearing as to whether or not the amount you were required to deposit was reasonable?

Mr. Matthews: Your Honor, if, if—yes, yes. The answer to that is correct. In essence that's what we offered to do in June, was to pay the money and let us reserve our right to have somebody later on decide whether the efficacy is there or not.

Chief Justice Wilentz: Not whether the damages were there or the amount was too great or too small but whether the order itself was proper or improper?

Mr. Matthews: No,—

Chief Justice Wilentz: You didn't reserve grounds to attack it beyond the kinds of grounds we've been talking about here?

Mr. Matthews: No, Justice, I wanted to reserve also whether or not what they were attempting to do there was proper and have an independent, if you will, judicial determination of that aspect.

Chief Justice Wilentz: Mr. Farrell?

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CERTIFICATION

I, DENISE WILKS, a transcriber approved by the Administrative Office of the Courts of New Jersey, do hereby certify that the foregoing Transcript of Proceedings in the matter of IMO DIRECTIVE OF DEPARTMENT OF ENVIRONMENTAL PROTECTION ISSUED TO KIMBER PETROLEUM, etc. and IMO J.I.S. INDUSTRIAL SERVICES LANDFILL, et al., heard in the

Supreme Court of New Jersey, Docket Nos. A-126, A-127 and A-128, on November 18, 1986, Tape AMA, Index beginning to end, Tape No. AMB, Index beginning to 1315, is true and accurate to the best of my knowledge and ability.

DATED: 12/19/86

/s/ Denise Wilks